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Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States

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CUMULATIVE SENTENCES FOR ONE CRIMINAL TRANSACTION UNDER THE DOUBLE JEOPARDY CLAUSE: *Whalen v. United States*

More than one hundred years ago, the Supreme Court recognized that the double jeopardy clause of the fifth amendment of the United States Constitution [1] prohibits imposition of multiple punishments for a single offense.[2] The Court subsequently has

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[1] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[2] *See Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); *see* notes 8-16 and accompanying text *infra*. The double jeopardy clause also prohibits multiple prosecutions for the same offense. The Supreme Court has summarized the two protections of the double jeopardy clause as follows: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 394 U.S. 711, 717 (1969) (footnotes omitted).

Courts have applied the prohibition against multiple prosecutions in a variety of criminal trial situations. If a jury acquits a defendant, the government may not seek a new indictment for the same offense or appeal the acquittal. United States v. Ball, 163 U.S. 662 (1896); *see* Fong Foo v. United States, 369 U.S. 141 (1962) (if, before completion of prosecution's case, judge acquits defendant on grounds of prosecutorial misconduct and lack of credible witnesses, government may neither appeal nor seek new indictment). Similarly, if a judge acquits a defendant during a bench trial, the government may not seek a new indictment for the same offense or appeal the acquittal. United States v. Jenkins, 420 U.S. 358 (1975).

In other circumstances, the Court has declared that the double jeopardy clause does not bar further prosecution. If a judge grants a defendant's motion to terminate proceedings before the case is submitted to the jury, for example, the government may appeal if the dismissal is unrelated to the factual question of defendant's guilt or innocence. United States v. Scott, 437 U.S. 82 (1978). The government may also appeal if a judge acquits the defendant after the jury has found him guilty. United States v. Wilson, 420 U.S. 332 (1975). If a judge grants a defendant's motion for a mistrial, the government may seek a new indictment unless judicial or prosecutorial overreaching provoked the motion. United States v. Dinitz, 424 U.S. 600 (1976). Likewise, the government may seek a new indictment for the offense if the judge declares a mistrial before acquittal or conviction on the basis of "manifest necessity" or because "the ends of public justice would be otherwise defeated." United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *see* Arizona v. Washington, 434 U.S. 497 (1978) (judge's failure to make explicit finding of "manifest necessity" does not open ruling to attack on double jeopardy grounds if record sufficiently justifies ruling). When a defendant successfully appeals his conviction, the government may retry him for the same offense if the reversal is due to trial error, United States v. Ball, 163 U.S. 62 (1896), but not if the reversal is attributable to insufficient evidence. Burks v. United States, 437 U.S. 1 (1978).

Some commentators have observed that these varying results are best understood by examining the individual and societal interests protected by the double jeopardy clause:

> [T]he principle of double jeopardy serves not one, but three distinct interests. In ascending degrees of importance, they are: (1) an interest in finality which

struggled to define the parameters of this constitutional protection.[3] The major problem involves multiple statutory violations arising from the same criminal event: may a court impose cumulative sentences for such violations, or do the statutory violations actually describe the same offense, thereby restricting the court to the imposition of only one sentence?[4] The numerical increase in statutory offenses, many of which overlap and duplicate other provisions of the federal criminal code,[5] has exacerbated this problem.

In *Whalen v. United States*,[6] the Supreme Court attempted to clarify the role of the double jeopardy clause in multiple-punishment cases. The *Whalen* Court held that a federal court must defer to congressional intent when determining whether a

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may be overcome relatively easily; (2) an interest in avoiding double punishment which comes armed with a presumption in the defendant's favor; and (3) an interest in nullification—*viz.*, an interest in allowing the system to acquit against the evidence—which is absolute.

Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84.

[3] *See* notes 17-19 and accompanying text *infra*.

[4] This issue arises in both "unit-of-prosecution" and "double-description" cases. Westen & Drubel, *supra* note 2, at 111. In a unit-of-prosecution case, the government indicts a defendant for more than one offense by fragmenting his conduct to cause multiple violations of a single statute. *Id.*; United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952); *see* Bell v. United States, 349 U.S. 81 (1955) (defendant who transported two women in one trip across state lines for immoral purposes indicted on two counts, one for each woman). In a double-description case, the government prosecutes a defendant for more than one offense by alleging violations of distinct statutes that are "merely different descriptions of the same offense." Westen & Drubel, *supra* note 2, at 111; *see* Gore v. United States, 357 U.S. 386, 392 (1958). The issue of multiple punishments may also arise in multiple-prosecution cases when the defendant "has been previously convicted of one offense and is then prosecuted for a second, different offense arising out of the same incident and conduct as the first offense." Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem*, 25 WAYNE L. REV. 825, 826 n.5 (1979).

[5] Note, *Statutory Implementation of the Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 363 (1956). For example, in Gore v. United States, 357 U.S. 386 (1958), the defendant was convicted of (1) selling illegal drugs without "a written order," in violation of I.R.C. § 4705(a) (repealed 1970); (2) selling and distributing illegal drugs not "in the original stamped package or from the original stamped package," in violation of I.R.C. § 4704(I) (repealed 1970); and (3) facilitating concealment and sale of the illegal drugs, with knowledge that the drugs had been unlawfully imported, in violation of § 2(c) of the Narcotic Drugs Import and Export Act, ch.100, 35 Stat. 614 (1909) (repealed 1970). 357 U.S. at 387. The Supreme Court held that the defendant could be punished separately for each conviction. *Id.* at 392; *see* note 18 *infra*. Similar statutory mazes exist at the state level; for example, the Tennessee criminal code in 1976 contained 60 separate provisions dealing with thefts. Comment, *Identity of Criminal Offenses in Tennessee*, 43 TENN. L. REV. 613, 633 n.123 (1976).

[6] 445 U.S. 684 (1980).

defendant may suffer cumulative sentences for distinct statutory offenses that arise from the same criminal event.[7]

I

HISTORICAL BACKGROUND

The Supreme Court first held that the double jeopardy clause protects a defendant from double punishment for the same offense in *Ex parte Lange*.[8] In *Lange*, a jury had convicted the defendant of stealing mailbags from a United States post office, an offense that carried a maximum penalty of either one year in prison or a $200 fine.[9] The judge mistakenly sentenced the defendant to both one year in prison *and* a $200 fine.[10] After the defendant had paid the fine and served five days of his prison sentence, the trial judge realized his error, vacated the original sentence, and resentenced the defendant to one year in prison without acknowledging that the defendant had already paid the $200 fine.[11] The Supreme Court vacated the second prison sentence and released the defendant, declaring that any further punishment would violate the double jeopardy clause.[12] Although

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[7] *See* notes 22-40 and accompanying text *infra*.

[8] 85 U.S. (18 Wall.) 163 (1873).

[9] *Id.* at 164.

[10] *Id.*

[11] *Id.*

[12] If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence . . . there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Id. at 168.

Although *Lange* explicitly held that the trial court contravened the double jeopardy clause by imposing the second sentence, *id.* at 176, the Court's reasoning suggests that the original sentence itself violated the constitutional guarantee:

> We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. . . . [The double jeopardy clause] forbid[s] that he should be punished again for that offence.

Id. This passage seems to indicate that the trial judge twice violated the double jeopardy clause: once, when he allowed the defendant to serve five days in prison after the defendant had extirpated the court's power to punish by paying the $200 fine, and again when he ordered a one-year prison sentence after the defendant had paid the $200 fine and served five days in prison. *See* Westen & Drubel, *supra* note 2, at 107-08. One commentator has argued, however, that *Lange* was really a multiple-prosecution case, and not a double-punishment case, because "the case involved two proceedings." Note, *Consecutive Sentences*

Lange held that the double jeopardy clause prohibits a federal court from imposing two separate and distinct penalties for an offense that carries a maximum of one penalty,[13] the Court also implied that the double jeopardy clause prohibits a court from imposing a penalty more severe than that which the legislature

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in Single Prosecutions: Judicial Multiplication of Statutory Penalties, 67 YALE L.J. 916, 919-20 n.17 (1958).

Although the history of the double jeopardy clause suggests that the Framers intended it to prohibit multiple prosecutions, 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 591 (8th ed. 1892) (once in jeopardy, defendant "exempt from any fresh prosecution"); J. SIGLER, DOUBLE JEOPARDY 27-33 (1969); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 659 (1833) (double jeopardy means being "tried a second time"), the *Lange* Court maintained that the constitutional protection also prohibits double punishment:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
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> The argument seems to us irresistible, and we do not doubt the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

85 U.S. (18 Wall.) at 173. English common law history is equivocal about the meaning of double jeopardy. At common law the plea of *autrefois convict* protected a defendant from a second trial for the same offense once a court initially convicted him. M. FRIEDLAND, DOUBLE JEOPARDY 89 (1969). One author notes, however, that "the *real* rationale behind the rule [against multiple convictions] is to prevent multiple punishments." *Id.* at 195 (emphasis in original); see *id.* at 200-04. *But see* United States v. Wilson, 420 U.S. 332, 343 (1975) ("When a defendant has been once convicted and punished for a particular crime, principles of *fairness* and *finality* require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." (emphasis added)). At common law, the possibility of multiple punishments at one trial for the "same offense" was slight. First, even though multiple-count indictments were not unusual, Note, *supra*, at 919-20 n.17, an indictment could charge only one felony, and only one sentence could be imposed pursuant to an indictment. Note, *supra* note 5, at 343. Thus, "[u]ntil joinder became permissible and commonplace . . . multiple punishment could result only from multiple trials." Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 266 n.13 (1965). Second, even after joinder became permissible, the relatively small number and broad scope of existing offenses often frustrated the prosecution's attempts to fragment an accused's criminal act into more than one offense. Note, *supra* note 5, at 342 & n.14; Note, *Double Jeopardy: An Illusive Expansion of a Constitutional Protection*, 14 GA. L. REV. 761, 764 (1980). Third, the combination of a high conviction rate and the existence of the death penalty provided little incentive for the prosecution to urge a narrow definition of "offense." Note, *supra* note 5, at 342.

[13] 85 U.S. (18 Wall.) at 176; *see* note 12 supra.

intended.[14] A defendant sentenced in such a manner is "doubly" punished in violation of the double jeopardy clause.

The defendant in *Lange* was charged with only one statutory offense. As the Court observed, "nice questions"[15] arise when a defendant commits one criminal act embracing multiple statutory offenses.[16] In such a situation, the nice question a federal court must answer is whether the defendant faces multiple punishment for the "same offense" or separate punishments for different offenses.

The Supreme Court's post-*Lange* attempts to define the impact of the double jeopardy clause in multiple-punishment cases have produced inconsistent results. The Court has refused to implicate the double jeopardy clause in some instances;[17] on other

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[14] The Court's decision in North Carolina v. Pearce, 395 U.S. 711 (1969), "confirmed the suggestion in *Lange* that a person suffers double punishment whenever his sentence is excessive under the domestic law." Westen & Drubel, *supra* note 2, at 108. In *Pearce*, the lower court had originally sentenced a defendant to 10 years in prison. After he had served two and one-half years of the sentence, the defendant's conviction was reversed. Subsequently, he was retried, reconvicted, and sentenced to 25 years in prison without credit for the time previously served. The Supreme Court held, "[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." 395 U.S. at 718-19 (footnote omitted). The Court reasoned that the double jeopardy clause prohibits courts from imposing sentences in excess of legislative authorization:

> The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. Suppose . . . in a jurisdiction where the maximum allowable sentence for larceny is 10 years' imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a 10-year sentence . . . he will have received multiple punishments for the same offense. For he will be compelled to serve separate prison terms of three years and 10 years; although the maximum single punishment . . . is 10 years' imprisonment. . . .

Id. at 718.

[15] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873).

[16] *See* note 12 *supra*.

[17] *See, e.g.*, Holiday v. Johnston, 313 U.S. 342, 349 (1941) (dictum) ("The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy."). In Bell v. United States, 349 U.S. 81 (1955), the Supreme Court reversed a judgment imposing cumulative sentences on a defendant who had been convicted on two counts of illegally transporting a woman in interstate commerce for the purpose of prostitution, *see* 18 U.S.C. § 2421 (1976), where the defendant had transported two women together in one vehicle. 349 U.S. at 82 (1955). The Court held that the "punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment." *Id.* Unable to discern a clear congressional intent to punish cumulatively, the Court decided that "the ambiguity should be resolved in favor of lenity." *Id.* at 83. The Court, however, did not frame the issue as a double jeopardy question.

occasions, the Court has indicated that the double jeopardy clause limits Congress's power to create distinct statutory offenses that punish the same criminal act.[18] More recently, the Court has suggested that the target of the double jeopardy limitation is not

[18] Simpson v. United States, 435 U.S. 6, 11-13 (1978) (dictum) ("Cases in which the government is able to prove violations of two separate criminal statutes with precisely the same factual showing ... raise the prospect of double jeopardy." *Id.* at 11); Jeffers v. United States, 42 U.S. 137, 155 (1977) (plurality opinion) (dictum) ("If some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes ... it is necessary to examine the problem more closely, in order to avoid constitutional multiple punishment difficulties."); Gore v. United States, 357 U.S. 386, 392 (1958) (dictum). The defendant in *Gore* allegedly committed two illegal drug transactions. His indictment contained three counts for each transaction. 357 U.S. at 387; *see* note 5 *supra.* A jury convicted the defendant of all six counts, and the district court sentenced him to one to five years on each count, the sentences on the first three counts to run consecutively, the sentences on the second three counts to run concurrently with the sentences on the first three counts. 357 U.S. at 387-88. The Supreme Court upheld the cumulative sentences: "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility ... these are peculiarly questions of legislative policy." *Id.* at 393. The Court relied on Blockburger v. United States, 284 U.S. 299 (1932), to support its view that Congress intended that persons involved in illegal drug transactions face the possibility of cumulative sentences. 357 U.S. at 388-90. In *Blockburger*, which had presented a similar fact pattern, the Court had held that a court could punish the defendant cumulatively for two offenses stemming from one incident because "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Neither the *Gore* nor the *Blockburger* Courts considered cumulative punishments as a question of double jeopardy. Instead, both Courts characterized the issue as one of statutory construction. *See* Gore v. United States, 357 U.S. 386, 388-93 (1958); Blockburger v. United States, 284 U.S. 299, 303-05 (1932). Although the *Gore* Court held that the imposition of cumulative punishments for different aspects of one illegal drug transaction was a question of "legislative policy," 357 U.S. at 393, the Court implied that Congress cannot circumvent the double jeopardy clause by legislating penalties for the same criminal offense in different statutory provisions:

> Finally, we have pressed upon us that the *Blockburger* doctrine offends the constitutional prohibition against double jeopardy. If there is anything to this claim it surely has long been disregarded in decisions of this Court.... In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority. Certainly if punishment for each of separate offenses as those for which the petitioner here has been sentenced, *and not merely different descriptions of the same offense*, is constitutionally beyond the power of Congress to impose, not only *Blockburger* but [many other cases] would also have to be overruled.

357 U.S. at 392 (emphasis added).

The *Blockburger* test, however, only determines whether Congress created two different statutory offenses. The *Gore* opinion shows that the *Blockburger* rule does not conclusively decide the further question of whether the distinct offenses require cumulative punishments. After applying the *Blockburger* rule, the *Gore* Court considered the cumulation issue:

> It seems more daring than convincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods, for each of which a separate

Congress, but the courts, in that the double jeopardy clause forbids a court from imposing more than one penalty for each legislatively proscribed offense.[19] The Court's inconsistent treatment

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> punishment was declared by Congress, somehow or other ought to have carried with them an implied indication by Congress that if all these three different restrictions were disregarded but, forsooth, in the course of one transaction, the defendant should be treated as though he committed only one of these offenses.

357 U.S. at 390-91. In his dissent, Chief Justice Warren criticized the majority's use of the rigid *Blockburger* rule to ascertain legislative intent concerning cumulative punishment:

> In every [multiple-punishment case] the problem is to ascertain what the legislature intended. Often the inquiry produces few if any enlightening results. . . . But this fact should not lead the judiciary . . . to settle such question by the easy application of stereotyped formulae. . . .
>
> Where the legislature has failed to make its intention manifest, courts should proceed cautiously, remaining sensitive to the interests of defendant and society alike. All relevant criteria must be considered and the most useful aid will often be common sense. In this case I am persuaded, on the basis of the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishment prescribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentences, that the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale.

Id. at 394.

The *Blockburger* rule actually originated in Gavieres v. United States, 220 U.S. 338, 342 (1911), a double jeopardy case involving multiple prosecutions. Some commentators maintain that the *Blockburger* rule should operate differently in multiple-punishment and multiple-prosecution cases, *see* Westen & Drubel, *supra* note 2, at 121-22 n.188, because courts use the rule to protect different interests in the two situations. In the multiple-punishment context, courts employ the *Blockburger* rule to protect defendants from double punishment. In the multiple-prosecution context, courts use the *Blockburger* rule both to protect defendants' interests in finality and to prevent harassment of defendants, as well as to preclude double punishment. *See* note 2 *supra*.

In Iannelli v. United States, 420 U.S. 770 (1975), a multiple-punishment case, the Court held that the *Blockburger* rule is merely a presumption of legislative intent, open to rebuttal by a showing of actual legislative intent. *Id.* at 785-86 & n.17. Although the *Blockburger* rule might allow multiple penalties in a particular case, if Congress has clearly intended only one penalty, a court should impose only one sentence for multiple statutory violations. Conversely, a court may impose multiple sentences for multiple statutory violations if Congress has clearly intended such punishment, notwithstanding a *Blockburger* recommendation to impose only one penalty.

In the multiple-prosecution context, however, the court may apply the *Blockburger* rule regardless of actual legislative intent regarding punishment. Thus, a court might determine that two statutory violations are not identical offenses under the *Blockburger* rule and allow successive prosecutions despite Congress's clear intent that only one penalty be imposed. Conversely, a court might determine that two statutory violations are, in fact, descriptions of the same offense under the *Blockburger* rule, and thereby prohibit successive prosecutions although Congress has clearly provided two separate penalties for the criminal conduct. *See* Westen & Drubel, *supra* note 2, at 162 n.346.

[19] *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 165 (1977) (dictum) ("Where consecutive sentences are imposed at a single criminal trial, the role of the constitutionl guarantee

of the double jeopardy clause in multiple-punishment cases parallels its treatment of the constitutional guarantee in multiple-prosecution cases.[20] The need to clarify the role of the double jeopardy clause in this area has become even more pressing since the Supreme Court's decision to apply certain aspects of the double jeopardy clause to the states.[21]

II

WHALEN V. UNITED STATES

After a District of Columbia Superior Court jury convicted Thomas Whalen of rape and felony murder,[22] the court sentenced

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[against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.").

[20] For example, in United States v. Scott, 437 U.S. 82 (1978), the Court held that the double jeopardy clause does not bar the government's appeal of a midtrial dismissal if the dismissal is based on circumstances unrelated to the question of the defendant's factual guilt or innocence. *Id.* at 92-95. *Scott* overruled United States v. Jenkins, 420 U.S. 358 (1975), which had held that the double jeopardy clause prohibits appeal by the government when a successful appeal would generate further proceedings to resolve factual issues relevant to the elements of the charged offense. *Id.* at 369-70. Justice Rehnquist, writing for the majority in *Scott*, stated, "[T]hough our assessment of the history and meaning of the Double Jeopardy Clause . . . occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that *Jenkins* was wrongly decided." United States v. Scott, 437 U.S. 82, 86-87 (1978).

[21] *See* Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)). In *Benton*, the Court held that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and it should apply to the States through the Fourteenth Amendment." Benton v. Maryland, 395 U.S. 784, 794 (1969). Subsequently, the Court indicated that only the "integral" elements of double jeopardy protection apply to the states. Crist v. Bretz, 437 U.S. 28, 32 (1978) (federal rule that jeopardy attaches when a jury is empaneled and sworn held integral to double jeopardy clause and thus applicable to states).

[22] Whalen v. United States, 445 U.S. 684, 685 (1980). The defendant was convicted under D.C. CODE ANN. § 22-2801 (1973) (rape) and D.C. CODE ANN. § 22-2401 (1973) (felony murder), which provide:

> Whoever has carnal knowledge of a female forcibly and against her will or whoever carnally knows and abuses a female child under sixteen years of age shall be imprisoned for any term of years of life,

id. § 22-2801; and

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon is guilty of murder in the first degree,

him to consecutive prison terms of fifteen years for rape and twenty years to life for first-degree murder.[23] Whalen challenged the cumulative punishments, contending that they violated federal statutory law and the double jeopardy clause of the fifth amendment.[24] On appeal, the District of Columbia Court of Appeals characterized the issue as one of statutory construction and refused to analyze the problem of cumulative punishments by "abstract consideration of the statutes involved."[25] Instead, the court upheld the cumulative sentences because the rape and felony-murder statutes protected distinct "societal interests,"[26] and "nothing in this legislation . . . suggest[ed] that Congress intended" to merge the two offenses.[27]

The Supreme Court reversed.[28] Characterizing Whalen's contention as a constitutional double jeopardy problem as well as

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id. § 22-2401. First-degree murder is punishable by death or imprisonment for a term of 20 years to life. *Id.* § 22-2404.

[23] Whalen v. United States, 445 U.S. 684, 685 (1980); *see* note 22 *supra.*

[24] 445 U.S. at 685-86.

[25] Whalen v. United States, 379 A.2d 1152, 1158 (D.C. 1977). The court noted that under Blockburger v. United States, 284 U.S. 299 (1932), "[m]erger of two offenses is ordinarily appropriate when the lesser offense consists entirely of some but not all of the elements of the greater offense." Whalen v. United States, 379 A.2d 1152, 1158 (D.C. 1977). The Court refused to apply the *Blockburger* rule, *see* note 18 *supra*, however, concluding that "rape is not a lesser included offense of felony murder"—"while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism." 379 A.2d at 1160; *see* note 26 *infra.*

[26] Whalen v. United States, 379 A.2d 1152, 1159 (D.C. 1977).

> The rape statute is to protect women from sexual assault. The felony murder statute purports to protect human life—it dispenses with the need for the prosecution to establish that the accused killed with a particular state of mind, and instead permits the jury to infer the requisite intent from the fact that a felony was committed.

Id.

[27] *Id.* The court apparently regarded the question of cumulative sentences as one of pure statutory construction and, absent explicit congressional intent, felt free to fashion its "societal-interest" test; the court never mentioned the double jeopardy clause.

[28] Whalen v. United States, 445 U.S. 684, 695 (1980). Although an earlier Supreme Court decision, Pernell v. Southall Realty, 416 U.S. 363, 368-69 (1974), had held that the Court would defer to the District of Columbia courts on matters of local law except in cases of egregious error, the *Whalen* majority refused to defer to the lower court's construction of the rape and felony-murder statutes because the question of cumulative punishments implicated the constitutional issue of double jeopardy. 445 U.S. at 687-88. The majority asserted that deference to the District of Columbia courts is a "matter of judicial policy, not a matter of judicial power," *id.*, and, therefore, the Court had power to review the lower court's interpretation of federal statutes enacted to apply only in the District of Columbia. Despite this possible statutory basis for review, the Court chose to review *Whalen*'s constitutional claim on grounds that "the petitioner's claim under the Double Jeopardy Clause [could] not be separated entirely from a resolution of the question of statutory construction." *Id.* at 688.

one of statutory construction,[29] the majority held that the double jeopardy clause, "at the very least,"[30] prevents a federal court from imposing cumulative sentences for one criminal act unless Congress has authorized such punishment.[31] The Court reasoned that the double jeopardy clause "embodies . . . the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress"[32]; federal courts are constrained by the separation of powers doctrine to obey congressional instructions concerning punishment.[33]

Justice White, concurring in part, maintained that deference to the appellate decision was unwarranted because the District of Columbia Court of Appeals had misconstrued the statutes. In Justice White's view, the double jeopardy clause was inapplicable. *Id.* at 695-96. Justice Rehnquist, joined in dissent by Chief Justice Burger, argued that review was unwarranted because the lower court had not committed egregious error. *Id.* at 707. Justice Rehnquist agreed with Justice White that the question presented did not implicate the double jeopardy clause. *Id.* at 702-06.

[29] "[T]he petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction." 445 U.S. at 688.

[30] *Id.* at 689. In his concurring opinion, Justice Blackmun indicated that the double jeopardy clause could not restrict Congress's power to impose multiple punishments for a single criminal act:

> The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more. . . .
>
> Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction.

Id. at 697 (emphasis in original).

[31] *Id.* at 688-89. The Court looked to three prior decisions to support its holding. In two of the cases, Gore v. United States, 357 U.S. 386 (1958), and Bell v. United States, 349 U.S. 81 (1955), the Court had held that legislative intent determines the propriety of cumulative sentences; the Court had not held, however, that the double jeopardy clause compels courts to accommodate legislative intent. *See* notes 17-18 and accompanying text *supra*. The third case, *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), arguably supports the *Whalen* Court's proposition. *See* notes 8-16 and accompanying text *supra*.

[32] 445 U.S. at 689. The Court suggested in dicta that the Constitution might also prevent state courts from imposing sentences in excess of state legislative authorization:

> [T]he doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States. *Dreyer v. Illinois*, 187 U.S. 71, 84 [(1902)]. . . . It is possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority of state courts in the same manner that it limits the power of federal courts. The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except as to the extent authorized by state law.

445 U.S. at 689-90 n.4. *See* note 21 and accompanying text *supra*.

[33] *See* 445 U.S. at 689.

Using such a legislative-intent approach, the Court observed that neither the rape and felony-murder statutes nor their relevant legislative histories indicated whether Congress had intended courts to impose cumulative sentences on defendants who had violated both statutes in a single criminal transaction.[34] The Court concluded, however, that another statutory provision[35] and its legislative history revealed that Congress intended the District of Columbia courts to "adhere strictly to the *Blockburger* test when construing the penal provisions" of the code.[36] According to *Blockburger*, the legislature has defined two distinct offenses when each offense requires proof of a fact that the other does not require.[37] Applying this rule in *Whalen*, the Court concluded that the offenses of rape and felony murder were the "same" for sentencing purposes; the felony-murder conviction necessitated proof of rape, and the facts required to prove the rape charge did not go beyond those essential to the felony-murder conviction.[38] The

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[34] *Id.* at 690.

[35] D.C. CODE ANN. § 23-112 (1973) provides:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

[36] 445 U.S. at 691-92. Clause 2 of D.C. CODE ANN. § 23-112 (1973) codifies the rule of Blockburger v. United States, 284 U.S. 299 (1932), which provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. For an extensive discussion of the *Blockburger* rule, see note 18 *supra*.

The *Whalen* Court found the phrasing of § 23-112 "less than felicitous," 445 U.S. at 691, because a "permissible literal reading" of the statute would allow District of Columbia courts to "ignore the *Blockburger* rule and freely impose consecutive sentences 'whether or not' the statutory offenses are different under the rule." *Id.* at 691 n.6. The Court concluded, however, that the legislative history of § 23-112 indicates that Congress intended to require District of Columbia courts to employ the *Blockburger* rule when construing the Code's penal provisions. 445 U.S. at 692-93; *see* H.R. REP. No. 907, 91st Cong., 2d Sess. 114 (1970).

The *Whalen* Court applied the *Blockburger* rule because Congress directed the use of such a test in multiple-punishment cases. 445 U.S. at 692-93. The majority opinion indicated that, in the absence of a clear congressional directive, the Court might have applied the rule anyway to resolve the ambiguous legislative intent. *Id.* at 691. The Court noted that the rule has been "consistently relied on . . . to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Id.*

[37] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[38] 445 U.S. at 693-94. "A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." *Id.*

Under the *Blockburger* standard, rape is a lesser included offense of the greater offense of felony murder; thus, the Court could not countenance cumulative sentences.

Court also applied the rule of lenity, under which courts resolve ambiguities in a penal code in the defendant's favor, to dispel any doubts concerning legislative intent.[39] Ultimately, the Court held that the trial court had contravened the double jeopardy clause by punishing the defendant twice when Congress had intended that he be punished only once.[40]

III

IMPLICATIONS OF *WHALEN*

"At the very least,"[41] the *Whalen* decision constitutionalizes legislative intent as the measure of double jeopardy in multiple-

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Justice Rehnquist, however, agreed with the government's position that rape should not be a lesser included offense because the felony-murder statute also includes killings in the course of five other felonies, and, therefore, proof of felony murder does not necessarily require proof of rape. *Id.* at 708-12 (Rehnquist, J., dissenting). The majority rejected this contention. *Id.* at 694. The Court acknowledged that rape and felony murder would be separate offenses under the *Blockburger* test if, for example, in a rape and robbery case, the defendant had killed the victim during the robbery; the Court maintained, however, that "[i]n the present case . . . proof of rape is a necessary element of proof of the felony murder." *Id.* Rape would unquestionably constitute a lesser included offense of felony murder

> if Congress, instead of listing the six lesser included offenses in the alternative [in one statutory section], had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance and we ascribe none to it.

Id. The Court rejected Justice Rehnquist's argnment, *id.* at 710-12, that the majority was applying the *Blockburger* rule to the facts alleged in the indictment, rather than interpreting the statutes involved. *Id.* at 694 n.8.

[39] *Id.* at 694, 695 n.10. The Court stated that doubts concerning congressional intent "must be resolved in favor of lenity." *Id.* at 694. The rule of lenity is a tool of statutory construction. Busic v. United States, 446 U.S. 398, 406 (1980). The Court first applied the rule to a multiple-punishment issue in Bell v. United States, 349 U.S. 81 (1955), although the constitutional issue of double jeopardy did not arise. *See also* Simpson v. United States, 435 U.S. 6 (1978); United States v. Bass, 404 U.S. 336 (1971); Ladner v. United States, 358 U.S. 169 (1958).

The rule of lenity is a corollary of the rule that requires penal statutes to be strictly construed against the government. 3 C. SANDS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 59.03 (4th ed. 1974). Courts should employ these rules of statutory construction to protect an individual from prosecution or punishment not clearly authorized by Congress. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department."). Courts should not, however, employ the rules of statutory construction to frustrate clear legislative intent. *See generally* Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935).

[40] 445 U.S. at 695.

[41] *Id.* at 689. By qualifying its holding in this manner, the Court implied that the double jeopardy clause may do more than incorporate legislative intent to determine the

punishment cases arising in federal courts.[42] In so doing, the Court implicitly rejected the proposition that the double jeopardy clause imposes a substantive limit on Congress's power to define and punish crimes.[43] Consequently, in multiple-punishment cases the double jeopardy clause constrains the courts but not Congress.[44]

As Justice Blackmun observed in concurrence, the *Whalen* decision should effectively overrule recent Court dicta implying that the double jeopardy clause contains an independent standard

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appropriate sentence in multiple-punishment cases. Two possibilities exist. First, the constitutional guarantee could include a presumption against the imposition of multiple sentences that is rebuttable by a clear showing of legislative intent. *See* notes 55-60 and accompanying text *infra*. Second, the constitutional guarantee could contain an independent standard which determines whether Congress has unconstitutionally created multiple punishments for the same offense. The rationale of *Whalen*, however, implicitly rejects the latter possibility. *See* note 43 and text accompanying notes 43-50 *infra*; Albernaz v. United States, 49 U.S.L.W. 4237, 4240 (U.S. March 9, 1981) (No. 79-1709) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed.").

[42] The Court's holding, which accepts the double jeopardy methodology implicit in *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), *see* notes 13-16 and accompanying text *supra*, should apply to all federal courts. The Court indicated that petitioner's statutory claim would have been decided first had the case been appealed from a United States Court of Appeals rather than the District of Columbia Court of Appeals, and petitioner's constitutional claim would only have been considered if necessary. 445 U.S. at 687. The Court's language, nevertheless, supports application of the *Whalen* methodology in all federal courts. *See id.* at 689 ("The Double Jeopardy Clause at the very least precludes *federal courts* from imposing consecutive sentences unless authorized by Congress to do so." (emphasis added)).

[43] Although the Court did not explicitly state that the double jeopardy clause cannot substantively restrict Congress's power to define and punish crimes, such a substantive limit would be inconsistent with the *Whalen* rationale. The Court argued that the federal separation of powers doctrine precludes judicial invocation of the double jeopardy prohibition to impede the exercise of Congress's "power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them." 445 U.S. at 689. The *Whalen* rationale is correct, *see* note 50 and accompanying text *infra*; however, the Court may have reserved explicit judgment on substantive effect to preserve the notion that in some instances the double jeopardy clause might act as a substantive check on Congress.

Two considerations support this hypothesis. First, Justice Blackmun's concurring opinion states that the "*only*" role of the double jeopardy clause in multiple-punishment cases is to incorporate legislative intent in determining the appropriate sentence. *Id.* at 697 (Blackmun, J., concurring); note 30 *supra*. The Court's failure to adopt Justice Blackmun's formulation suggests that the majority was unwilling to so limit the judiciary's role in the provision of criminal penalties. Second, in Albernaz v. United States, 49 U.S.L.W. 4237 (U.S. March 9, 1981) (No. 79-1709), three members of the *Whalen* majority refused to support the *Albernaz* majority's contention that the double jeopardy clause itself does not restrict Congress's power to define and punish crimes: "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of Blockburger v. United States. . . ." *Id.* at 4241 (Stewart, J., concurring).

[44] *But see* note 60 and accompanying text *infra*.

for determining what constitutes one criminal offense; the double jeopardy clause alone cannot prescribe the number of penalties a court should impose for the perpetration of one criminal transaction.[45] Surely the double jeopardy protection would not be violated if Congress enacted a statute making rape an offense punishable by fifteen years' imprisonment, with an additional twenty-year sentence if the victim were killed during the rape.[46] Such a provision would have the same effect as a statutory scheme allowing courts to cumulate a fifteen-year rape sentence and a twenty-year felony-murder sentence. Because the double jeopardy clause does not bar the first statute, it should not bar the second statutory scheme; the only practical difference between the two schemes is the method of drafting. Thus, the presence of legisla-

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[45] *See* note 30 *supra. But see* note 43 *supra.* Justice Rehnquist, in dissent, declared, "To the extent that this [substantive theory of double jeopardy] assumes that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses, 'it demands more of the Double Jeopardy Clause than it is capable of supplying.'" 445 U.S. at 701 (quoting Westen & Drubel, *supra* note 2, at 113). Westen and Drubel observe, "There is simply no way to make sense out of the notion that a course of conduct is 'really' only one act, rather than two or three, or, indeed, as many as one likes." Westen & Drubel, *supra* note 2, at 114. *See also* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 269-77 (1965). In light of the diverse purposes of punishment, the application of a single constitutional standard to determine whether one act constitutes one offense or multiple offenses is nearly impossible. *See* Westen & Drubel, *supra* note 2, at 113-16.

[46] See Gore v. United States, 357 U.S. 386, 392-93 (1958), in which the Court recognized that the double jeopardy clause would not have prevented congressional enactment of one statute encompassing the acts covered by the three statutes under which the defendant was actually convicted:

> Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years' imprisonment: *Provided, however*, That if he makes such sale in pursuance of a written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: *Provided further*, That if he sells such drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: *And provided further*, That if he sells such drugs in pursuance of a written order and from a stamped package, he shall be sentenced to only five years' imprisonment." Is it conceivable that such a statute would not be within the power of Congress?

Id. at 393-94. *See also* note 5 *supra.* Although a statute that contains certain enhancement-of-penalty provisions might violate other constitutional guarantees, *see* notes 51-54 and accompanying text *infra*, it would not contravene the double jeopardy clause. Moreover, the hypothetical rape and felony-murder statute described in the text would not violate the eighth amendment prohibition against cruel and unusual punishment; the statute effectively imposes a 35-year sentence, a term clearly constitutional under Rummel v. Estelle, 445 U.S. 263 (1980). *See* note 54 *infra.*

tive power to define an offense renders application of the double jeopardy clause insufficient to determine whether a defendant has been punished twice for the same offense.[47] The dispositive double jeopardy issue in a multiple-punishment case is the determination of what punishment Congress has authorized for a criminal act, not whether Congress has imposed excessive penalties.[48] Because the double jeopardy clause "serves principally as a restraint on courts and prosecutors," [49] the *Whalen* decision justifiably interprets the constitutional guarantee as incorporating legislative intent and imposing no limit on the legislature.[50]

The legislative-intent analysis of double jeopardy does not deprive a defendant of all constitutional protection from an overzealous legislature; it only eliminates the double jeopardy clause as such protection. As the *Whalen* Court recognized,[51] other constitutional guarantees, particularly the eighth amendment prohibition against cruel and unusual punishment, should protect defendants from excessive or unreasonable punishment.[52] Federal

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[47] *See* Westen & Drubel, *supra* note 2, at 113. Moreover, the double jeopardy clause would not prohibit Congress from enacting two identical statutes to punish a defendant for the same act. *See id.* at 115 n.158.

[48] *See id.* at 112-13, 118. The legislative-intent theory of double jeopardy should apply to concurrent sentences as well as to cumulative sentences. The double jeopardy clause should prevent federal courts from imposing concurrent sentences for one criminal act if Congress intended only one sentence and the punishment under the concurrent sentences exceeds the punishment for one offense—for example, if concurrent sentences increase the time a defendant must serve before becoming eligible for parole.

[49] Brown v. Ohio, 432 U.S. 161, 165 (1977).

[50] If the double jeopardy clause includes a prohibition against multiple punishments, it is because courts and prosecutors should not be able to do in one proceeding what they cannot do in two successive prosecutions—convict a defendant twice for the same offense. *See* note 12 *supra*. Once a court accepts this proposition, its only remaining task is to give content to the term "same offense." As the *Whalen* Court recognized, Congress alone defines offenses and determines how much punishment a defendant can receive for one criminal transaction. The double jeopardy clause, however, does provide the judiciary with an independent standard to determine when a defendant can be *prosecuted* more than once for the same transaction. *See* note 18 *supra*.

[51] 445 U.S. at 689 n.3. The Court cited five cases that demonstrate other constitutional limitations on legislative power to define criminal offenses: Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape held cruel and unusual punishment); Roe v. Wade, 410 U.S. 113 (1973) (criminal penalty for abortion voided by abortion's fundamental right status); Stanley v. Georgia, 394 U.S. 557 (1969) (first amendment protects mere possession of obscene material); Loving v. Virginia, 388 U.S. 1 (1967) (statutory scheme forbidding marriages based on racial classifications violates fourteenth amendment equal protection clause); Robinson v. California, 370 U.S. 660 (1962) (punishment based on status as drug addict held cruel and unusual).

[52] *See* Westen & Drubel, *supra* note 2, at 114-15 (excessive cumulative punishments violate eighth amendment, not double jeopardy clause); Note, *supra* note 5, at 363-64 & n.18 (eighth amendment and substantive due process constitute only limitations on Congress's power to punish criminal act); Comment, *supra* note 5, at 613 (same). *But see* W.

courts, however, have been reluctant to invoke the eighth amendment to strike down cumulative sentences.[53] By eliminating the availability of the double jeopardy clause for this purpose, the *Whalen* decision may portend an inclination to reevaluate the Court's limited use of the eighth amendment against excessive punishments in multiple-punishment cases.[54]

LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 136-44 (1972) (Supreme Court has avoided striking down criminal statutes for lack of substantial relation to public welfare).

Justice Field first suggested, in 1892, that the eighth amendment should prohibit excessive sentences:

> The [eighth amendment] inhibition is directed, not only against punishments of [torture] . . . , but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.

O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). The Court later adopted Justice Field's position in Weems v. United States, 217 U.S. 349, 367 (1910): "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense." The *Weems* Court found this construction of the eighth amendment necessary to prevent the legislature from using its "unlimited" power to define criminal acts as an "instrument of tyranny." *Id.* at 372-73. Since *Weems*, however, federal courts have been reluctant to strike down sentences on eighth amendment grounds. *See* note 53 *infra*.

Substantive due process might also temper Congress's power to prescribe criminal penalties by invalidating legislative sentencing schemes that do not bear a substantial relationship to a legitimate public concern. *See* W. LAFAVE & A. SCOTT, *supra*, at 137. Substantive due process considerations, however, are unlikely to arise for two reasons. First, the Supreme Court has only employed the doctrine to strike down criminal statutes that proscribe a certain activity, *see id.* at 137 & n.6 (collecting cases); the Court has never held that the severity of a sentence imposed under an otherwise valid statute violates substantive due process. Second, since Nebbia v. New York, 291 U.S. 502 (1934), the Court has generally refrained from invalidating statutes on substantive due process grounds. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.") and cases cited therein. *But see* Roe v. Wade, 410 U.S. 113 (1973).

[53] *See, e.g.*, Badders v. United States, 240 U.S. 391 (1916); *see* Comment, *supra* note 45, at 301 n.167 (collecting cases).

In Rummel v. Estelle, 445 U.S. 263 (1980), which did not involve cumulative sentences, the Court upheld the constitutionality of a Texas statute as applied to the defendant. The statute allowed a court to sentence a recidivist convicted of his third "petty" property felony to life imprisonment. The *Rummel* majority rejected the defendant's argument that the severity of his punishment was disproportionate to the crime committed and thus violated the eighth amendment. *Id.* at 285. The majority distinguished earlier decisions striking down death penalty statutes under the eighth amendment on the ground that "a sentence of death differs in *kind* from any sentence of imprisonment, no matter how long. . . ." *Id.* at 272 (emphasis added). The Court stated that except in extreme cases of disproportionality, "the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.* at 274. The Court reasoned that the inability to derive "objective" standards for adjudicating the reasonableness of criminal punishments reinforced the conclusion that sentencing decisions must find their "sustaining force in the legislatures." *Id.* at 283-84.

[54] The Court currently appears divided on the propriety of invoking the eighth amendment to strike down excessive sentences. Although the majority in Rummel v.

The impact of the *Whalen* decision on multiple-punishment cases may extend beyond the incorporation of congressional intent into the double jeopardy clause.[55] The decision arguably elevates the rule of lenity to constitutional status.[56] According to *Whalen*, a sentencing judge who cannot ascertain whether Congress clearly intended cumulative punishments for multiple statutory offenses that emanate from one criminal act should resolve

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Estelle, 445 U.S. 263 (1980), held that such use of the eighth amendment would defeat the legislature's prerogative, *see* note 53 *supra*, four Justices strongly dissented. They maintained that the sentence violated the eighth amendment, arguing that the punishment was disproportionate to the crime and "would be viewed as grossly unjust by virtually every layman and lawyer." *Id.* at 307. They characterized the majority's decision against judicial review of sentences as choosing "the easiest line rather than the best." *Id.* Thus, at least four Justices appear willing to reconsider the use of the eighth amendment against harsh sentencing schemes. *See generally* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1030 n.86 (1980).

[55] Professor Westen contends that if the double jeopardy clause merely incorporates by reference whatever penalty is authorized by statutory law, the clause "produces a principle of double punishment that will always be either superfluous or irrelevant . . . because the court's constitutional analysis will always be identical to, and entirely derivative from its statutory analysis of legislative intent." Westen, *supra* note 54, at 1025. This argument does not, however, compel the conclusion that the double jeopardy clause should do more than incorporate congressional intent; the scope of the constitutional protection against multiple punishment should derive from the Constitution, not from some notion of the "best" double jeopardy doctrine. *See* Gore v. United States, 357 U.S. 386, 392 (1958) (double jeopardy rooted in history, unlike an evolving concept such as due process). The *Whalen* Court used the constitutional doctrine of separation of powers to confine the scope of double jeopardy to congressional intent. *See* notes 32-33 and accompanying text *supra*; note 61 *infra*.

The characterization of the multiple-punishment issue as a statutory or constitutional question may appear to be a matter of judicial semantics, but the choice may have siguificant consequences for the defendant. Casting the multiple-punishment issue in constitutional terms may allow a defendant convicted in federal court to seek habeas corpus relief on constitutional grounds. *See* Peters, *Collateral Atttack by Habeas Corpus Upon Federal Judgments in Criminal Cases*, 23 WASH. L. REV. 87, 91-92 (1948); Note, *supra* note 12, at 920-21 n.18. With the exception of *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), however, the Supreme Court has "uniformly rejected" all double jeopardy challenges when granting habeas corpus review in multiple-punishment cases. *See* Note, *supra* note 12, at 919-20 n.17 (collecting cases). Even if a court denies habeas corpus review, a defendant convicted in federal court may collaterally attack his sentence under 28 U.S.C. § 2255 (1976) on the ground that it violates the Constitution, federal laws, or exceeds the maximum penalty authorized by law.

[56] One commentator has explained the advantages of constitutionalizing the rule of lenity in multiple-punishment cases:

> It frees the legislature to define offenses and parcel out sentences in the way the legislature desires, by requiring the courts to adhere to legislative schemes of punishment that are "clear and unmistakable." Yet it also permits the courts to reject judicial interpretations of domestic law, by authorizing the courts to subject multiple punishment to constitutional review, and to invalidate such punishment wherever the evidence for its intended existence is less than clear.

Westen, *supra* note 54, at 1026-27 (footnotes omitted).

his doubts "in favor of lenity."[57] By constitutionalizing the judge's inquiry as to congressional intent, *Whalen* also constitutionalizes the tool of statutory construction used in the absence of clear legislative intent—the rule of lenity.[58] Thus, *Whalen* arguably recasts the rule of lenity as a constitutional presumption required by the double jeopardy clause;[59] as an independent sub-

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[57] 445 U.S. at 694; *see* note 39 *supra*. The *Whalen* Court determined that Congress generally intended that the District of Columbia courts apply the *Blockburger* rule when sentencing defendants convicted of multiple statutory offenses. 445 U.S. at 690-93; *see* notes 34-36 and accompanying text *supra*. The government argued that under the *Blockburger* rule, rape and felony murder are not "the same" because the felony-murder statute proscribes killing in the course of committing "rape *or* robbery *or* kidnapping *or* arson, etc.," and, therefore, rape is not a necessary element of felony murder. 445 U.S. at 694; *see* note 38 *supra*. The Court rejected this contention, 445 U.S. at 694, but conceded, "To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Id.*

[58] One commentator has suggested that the *Whalen* Court's reference to Bell v. United States, 349 U.S. 81 (1955), in the double jeopardy context indicates the Court's intention to constitutionalize the rule of lenity. Westen, *supra* note 54, at 1029 n.84. *Bell* was not a double jeopardy case, *see* note 17 *supra*, but it was the first to articulate the rule of lenity, *see* notes 17 & 39 *supra*.

[59] One commentator has suggested that the *Whalen* decision, in holding that the double jeopardy clause "at the very least" precludes a federal court from imposing multiple sentences where Congress intended but one sentence, implies that, at most, the double jeopardy clause creates a constitutional presumption against multiple sentences unless Congress clearly intended such punishment. Westen, *supra* note 54, at 1031-32. Professor Westen grounds his assertion on the majority's refusal to adopt Justice Blackmun's opinion, which states that the double jeopardy clause merely incorporates legislative intent, and the majority's implicit rejection of the defendant's argument that the double jeopardy clause provides an independent standard to determine what constitutes the same offense. *Id.* at 1031. *But see* note 43 *supra*.

Adoption of a constitutional presumption of lenity should signal the demise of judicially created tests like the *Blockburger* rule, except in rare instances where Congress has explicitly required, as in *Whalen*, that courts use the rule to determine whether two offenses are the "same" for purposes of punishment. *See* note 36 *supra*. In view of *Whalen*, a federal court should first look for a clear legislative intent regarding multiple punishments, and if ambiguity exists, the court should impose only one punishment. A court examining legislative intent should not resort to rigid, mechanical tests of statutory construction like the *Blockburger* rule.

To date, the Supreme Court has recognized neither the constitutional status of the rule of lenity nor the potential effects of that status on the *Blockburger* rule. In Albernaz v. United States, 49 U.S.L.W. 4237 (U.S. March 9, 1981) (No. 79-1709), the Court acknowledged the use of the rule of lenity to resolve "statutory ambiguity," *id.* at 4240, while limiting the problem of statutory ambiguity by assuming congressional awareness of the *Blockburger* rule. *Id.* at 4239-40. The *Albernaz* Court rejected the defendants' contention that the two statutes under which they were convicted—21 U.S.C. § 846 (1976) (conspiracy to distribute marihuana) and 21 U.S.C. § 963 (1976) (conspiracy to import marihuana)—were ambiguous as to whether Congress intended cumulative sentences for violations of both statutes through one conspiracy. The Court found the legislative history "silent on this issue," 49 U.S.L.W. at 4239, but nevertheless concluded that the "statutory provisions . . . are unambiguous on their face and [the] legislative history . . . gives . . . no reason to pause over the manner in which these provisions should be interpreted." *Id.* at 4240.

stantive limit, the presumption of lenity would require Congress to clearly state that it intends multiple punishments for multiple offenses that could arise from a single criminal event.[60]

Although *Whalen* clearly establishes that the double jeopardy clause requires federal courts to use the legislative-intent methodology in multiple-punishment cases, the decision's effect on state court trials is uncertain. Federal courts are compelled by the constitutional doctrine of separation of powers to incorporate legislative intent as the standard for double jeopardy.[61] Because the separation of powers doctrine is not applicable to the states, the

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Rather than requiring clear legislative intent with respect to cumulative punishments, the *Albernaz* Court imputed such intent by presuming that "Congress was aware of the *Blockburger* rule and legislated with it in mind." *Id.*

The *Albernaz* Court's application of the *Blockburger* rule in the absence of explicit contrary legislative intent effectively creates a presumption in favor of multiple punishment for a conspiracy with multiple objectives. Moreover, application of the *Blockburger* rule creates a presumption in favor of multiple offenses whenever Congress has enacted two statutes that outlaw one act but contain different legal or factual elements. The *Blockburger* rule, however, does not accurately indicate whether Congress intended multiple punishments; it merely determines whether Congress created multiple offenses embracing the same act. *See* note 18 *supra*. Nonetheless, the *Albernaz* Court maintained that its use of the *Blockburger* rule was proper:

> Congress cannot be expected to specifically address each issue of statutory construction which may arise. But, as we have previously noted, Congress is "predominantly a lawyer's body," ... and it is appropriate for us "to assume that our elected representatives ... know the law." ... As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind. It is not a function of this Court to presume that "Congress was unaware of what it accomplished...."

49 U.S.L.W. at 4240 (citations omitted).

[60] *See* Westen, *supra* note 54, at 1027 n.81 ("A constitutional presumption of [lenity] does not place a federal court in the untenable position of either passively parroting or wrongfully second-guessing a domestic court's interpretation of domestic law ... because the *substantive content* of the constitutional rule requires a court to strike down multiple sentences unless domestic law 'clearly and unmistakeably' intends them." (emphasis in original)). Professor Westen contends that state courts as well as federal courts must apply the rule of lenity as a constitutional presumption when construing state statutes. *See id.* This conclusion is unsupportable. If the legislative-intent methodology of the double jeopardy clause does not apply to the states, then its corollary rule—the rule of lenity—should not apply to the states. *See* notes 64-66 and accompanying text *infra*.

[61] The Fifth Amendment guarantee against double jeopardy embodies ... simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers....

445 U.S. at 689 (citations omitted); *see* notes 32-33 and accompanying text *supra*.

double jeopardy clause, as applied through the fourteenth amendment, does not compel state courts to follow the same methodology.[62] Instead, according to the *Whalen* Court, the fourteenth amendment's due process clause alone might prevent state courts from imposing greater punishment than the state legislature intended.[63]

The Court correctly assumed that the double jeopardy clause does not require state courts to adopt the legislative-intent methodology. In prior decisions the Court has applied only the "integral" elements of the double jeopardy clause to the states.[64] Because the separation of powers doctrine, rather than some principle inherent in the double jeopardy clause itself,[65] compels federal courts to follow the legislative-intent methodology, the approach is not so "integral" to the double jeopardy clause as to compel its adoption by the states as well.[66]

The Court went astray, however, in its further suggestion that the fourteenth amendment's due process clause would "circumscribe the penal authority of state courts in the same manner" [67] as the double jeopardy clause limits federal courts. This suggestion overlooks fundamental principles governing federal judicial review of state court decisions. First, the Court's assertion that the due process clause might prevent state courts from "depriving persons of liberty or property as punishment for criminal conduct except as to the extent authorized by state law" [68] implies that a state court's construction of state legislative intent is a reviewable federal question in all multiple-punishment cases. Yet federal courts should not entertain an action claiming a violation of due process on a mere showing that state action was unauthorized by state law.[69] Second, even if a federal court does en-

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[62] 445 U.S. at 689-90 n.4; *see* note 32 *supra*.

[63] 445 U.S. at 689-90 n.4.

[64] Crist v. Bretz, 437 U.S. 28, 38 (1978); *see* note 21 *supra*.

[65] *See* note 61 *supra*.

[66] *But see* Westen, *supra* note 54, at 1024-25 (double jeopardy clause prohibits both state and federal courts from imposing punishment more severe than legislature intended). Similarly, the presumption of lenity does not appear so integral to the double jeopardy clause as to require its application in state criminal procedings. If *Whalen*'s legislative-intent methodology is inapplicable to the states (as a non-integral aspect of the double jeopardy clause), the methodology's corollary—lenity—should not apply to the states either.

[67] 445 U.S. at 689-90 n.4.

[68] *Id.*

[69] As Justice Rehnquist stated in dissent, "To the extent that the Court implies that a state court can ever err in the interpretation of its own law and that such an error would create a federal question reviewable by this Court, I believe it clearly wrong." *Id.* at 706. *See also* Garner v. Louisiana, 368 U.S. 157, 169 (1961) (state courts "have the final authority to interpret" state legislation).

tertain a due process claim based solely on the assertion that the state court's interpretation of state law constituted unauthorized

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When a state court has interpreted state law as authorizing cumulative punishments for a single criminal transaction, a convicted defendant cannot attack the sentences in federal court merely by claiming that the penalties are unauthorized by state law and, therefore, violate the fourteenth amendment's due process protection. *See* Barney v. City of New York, 193 U.S. 430 (1904). In *Barney*, complainant argued in federal court that he had been deprived of property without due process of law, in violation of the fourteenth amendment, by the Rapid Transit Board's construction of an underground tunnel that deviated from the route approved by property owners. *Id.* at 431-33. The New York courts, interpreting state law, had held the construction to be unauthorized because of such deviation. *Id.* at 437. "The bill of complaint seem[ed] to have been framed principally upon the theory that the acts of the defendants constituted ... a violation of the Fourteenth Amendment, not because of their intrinsic nature, but simply because they were a violation of state law." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 942 (2d ed. 1973). The Supreme Court dismissed the suit, 193 U.S. at 441, explaining:

> Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the State. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law.

Id. at 437-38 (citations omitted). Thus, *Barney* stands for the proposition that the mere allegation of a violation of state law does not in itself present a federal question reviewable in federal court. State action violates the due process clause of the fourteenth amendment only if the action, whether authorized or not, intrinsically violates some notion of fundamental fairness, *see, e.g.*, Snowden v. Hughes, 321 U.S. 1, 10-11 (1944) ("[An act's] illegality under [a] state statute can neither add to nor substract from its constitutional validity. *Mere violation of a state statute does not infringe the federal Constitution.*" (emphasis added)), or if the motivation for engaging in conduct proscribed by state law independently presents a federal question. *See, e.g., id.* at 10-11 (dictum) (unauthorized state action violates fourteenth amendment if it invidiously and purposefully discriminates).

The complainant in *Barney* may have attempted to raise a fourteenth amendment fundamental fairness question when he argued that "said rapid transit act, so far as it purports to authorize the construction of a tunnel and railway ... without the consent of abutting owners or compensation therefore, is void, because it deprives [complainant] of his property without due process of law...." 193 U.S. at 433; *see* HART & WECHSLER, *supra*, at 942. The Court's opinion did not discuss this contention and it seems doubtful that the allegation raised a substantial federal question. *Id.* As the defendants noted, the tunnel did not affect the light, air, or access of the complainant; consequently, "the alleged impairment of the comfort to be enjoyed in the plaintiff's premises through the acts of the city and its Rapid Transit Board underneath the surface of its own streets [was] not a taking of property within the meaning of the Fourteenth Amendment." 193 U.S. at 436. Several lower courts have misinterpreted *Barney* as denying jurisdiction on the ground that unauthorized action by state officials is not state action and thus raises no fourteenth amendment claim. *See* HART & WESCHLER, *supra*, at 943.

In the multiple-punishment context, when a state court interprets state law as authorizing cumulative sentences for one criminal act, a defendant does not raise a federal question merely by asserting that state law does not authorize the punishments. To raise a federal question, the defendant must show that the state court's interpretation of state law, regardless of whether it was "authorized" or not, violates the fundamental fairness requirement of the fourteenth amendment. The likelihood of such a demonstration by the defen-

state action, the scope of review of the claim would be much narrower than on a federal defendant's double jeopardy claim. A federal defendant who receives multiple sentences for one criminal act may appeal the federal court's determination of congressional intent and request a *de novo* determination of the propriety of cumulative sentences.[70] In contrast, a defendant challenging similar state court sentences in federal court may attack the state court's determination of state legislative intent only on the ground that the decision lacks "fair support."[71] Hence, the fourteenth amendment's due process clause should rarely interfere with a state court's role as the final interpreter of state law.[72]

CONCLUSION

The Supreme Court's decision in *Whalen v. United States*[73] properly articulates the role of the double jeopardy clause in the federal system. The Court's conclusion that this constitutional guarantee prohibits federal courts from punishing in excess of congressional authorization and intent dispels the notion that the double jeopardy clause places substantive restrictions on legislative power to define and punish criminal acts. In addition, the *Whalen* decision arguably constitutionalizes the rule of lenity, giving the double jeopardy clause substantive content as a presumption against cumulative sentences for a single criminal transaction when legislative intent is ambiguous. Moreover, the decision cor-

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dant seems remote. First, the Supreme Court is unlikely to conclude that the combined length of the sentences violates the fairness requirement implicit in the due process clause. *See* notes 52-53 *supra*. Second, in many multiple-punishment cases, the state court will be determining legislative intent for the first time; therefore, the defendant will have difficulty contending that the court's intepretation treats him discriminatively or unfairly.

[70] In *Whalen*, the Court refused to accord "customary deference" to the lower court's construction of local federal legislation. 445 U.S. at 687-88; *see* note 28 *supra*. Noting that such deference is a matter of judicial policy, not judicial power, 445 U.S. at 687, the Court instead conducted its own examination of legislative intent and discovered a statute that revealed Congress's intent that one penalty suffice. *See* notes 35-36 and accompanying text *supra*. If a defendant appeals from a federal district court's interpretation of legislative intent, the federal appellate courts, like the *Whalen* Court, will conduct their own inquiry into legislative intent. *See, e.g.*, Albernaz v. United States, 49 U.S.L.W. 4237 (U.S. March 9, 1981) (No. 79-1709).

[71] *See* Demorest v. City Bank Co., 321 U.S. 36, 42 (1944) ("[I]f there is no evasion of the constitutional issue [by the state court], and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.") (quoting Broad River Power Co. v. South Carolina, 281 U.S. 537, 540-41 (1930)).

[72] *See* note 69 *supra*.

[73] 445 U.S. 684 (1980).

rectly recognizes that because the doctrine of separation of powers compels the use of legislative intent to define the scope of the double jeopardy protection in federal courts, the methodology is inapplicable to the states through the double jeopardy clause. The Court's opinion, however, incorrectly suggests that a reviewable federal question would exist if a defendant demonstrated that a state court's interpretation of state legislative intent had resulted in punishment unauthorized by state law because it had exceeded actual legislative intent. Even if a federal court entertains such a due process claim, the court's scope of review should be limited to determining whether the state court's decision had "fair support."

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